MAY 30 2001

No. 00-1045

Supreme Court, U.S.
FILED
MAY 30 2001
OFFICE OF THE CLERK

In The

Supreme Court of the United States

TRW INC.,

Petitioner,

v.

ADELAIDE ANDREWS,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF *AMICI CURIAE* OF THE NATIONAL ASSOCIATION OF CONSUMER ADVOCATES, NATIONAL CONSUMER LAW CENTER, U.S. PUBLIC INTEREST RESEARCH GROUP, PRIVACY RIGHTS CLEARINGHOUSE, AARP, AND CONSUMER FEDERATION OF AMERICA IN SUPPORT OF RESPONDENT

RICHARD J. RUBIN
(*Counsel of Record*)
1300 Canyon Road
Santa Fe, New Mexico
87501
(505) 983-4418

JOANNE S. FAULKNER
123 Avon Street
New Haven, Connecticut
06511
(202) 772-0395

WILLARD P. OGBURN
NATIONAL CONSUMER LAW CENTER
18 Tremont Street, Suite 400
Boston, Massachusetts
02108
(617) 523-8010

DEBORAH M. ZUCKERMAN
STACY J. CANAN
AARP FOUNDATION
MICHAEL R. SCHUSTER
AARP
601 E Street, N.W.
Washington, DC 20049
(202) 434-6045

Counsel for Amici Curiae

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

BEST AVAILABLE COPY

28 pp

TABLE OF CONTENTS

Page

INTEREST OF *AMICI CURIAE* 1

SUMMARY OF ARGUMENT 4

ARGUMENT 5

A. Congress Has Determined That Accuracy and Respect for Privacy in Disseminating Personal Financial Information Are Essential in a Credit Economy 5

B. The Three Major Consumer Reporting Agencies Have Failed to Take Available Action to Abate the Current Theft of Identity Crisis 9

C. Petitioner's Claim That the Decision Below Undermines the "Balance" Established by Congress Is a Canard 12

1. The Plain Language Chosen by Congress Belies Petitioner's Argument 13

2. Petitioner Relies on Notice Provisions Which Do Not Protect Victims of Theft of Identity... 14

3. Consumer Reporting Agencies Convinced Congress to Eliminate the Very Access Provision Which Would Have Supported the Position Now Advanced Before This Court..... 16

4. Petitioner's Claimed Record-Keeping Burden is Unfounded 18

5. The Only Statutory Balance at Risk Is the Private Enforcement Remedy That Petitioner Now Seeks to Eliminate 19

CONCLUSION 22

TABLE OF AUTHORITIES

Page

CASES

Bryant v. TRW Inc., 689 F.2d 72 (6th Cir. 1982) 6

Cushman v. Trans Union Corp., 115 F.3d 220 (3d Cir. 1997) 8, 11

DiMezza v. First USA Bank, Inc., 103 F.Supp.2d 1296 (D.N.M. 2000) 21

Federal Trade Commission v. TRW Inc., 784 F.Supp. 361 (N.D. Tex. 1991) 9

Houghton v. Insurance Crime Prevention Institute, 795 F.2d 322 (3d Cir. 1986) 14

McMillan v. Experian Information Services, Inc., 119 F.Supp.2d 84 (D.Conn. 2000) 21

Mourning v. Family Publication Service, Inc., 411 U.S. 356 (1973) 7

Philbin v. Trans Union Corp., 101 F.3d 957 (3d Cir. 1996) 11

Thompson v. San Antonio Retail Merchants Association, 682 F.2d 509 (5th Cir. 1982) (Per Curiam) 11

Trans Union Corp. v. Federal Trade Commission, 245 F.3d 809 (D.C. Cir. 2001) 6

United States v. Equifax Credit Information Services, Inc., No. 1:00-CV-0087 (N.D. Ga. 2000), available at http://www.ftc.gov/os/2000/01/equifaxconsent.htm 18

TABLE OF AUTHORITIES – Continued

Page

United States v. Experian Information Solutions, Inc., No. 3-00CV0056-L (N.D. Tex. 2000), available at http://www.ftc.gov/os/2000/01/experianconsent.htm 18

United States v. Trans Union LLC, No. 00C 0235 (N.D. Ill. 2000), available at http://www.ftc.gov/os/2000/01/transunionconsent.htm 18

Whitesides v. Equifax Credit Information Services, Inc., 125 F.Supp.2d 807 (W.D.La. 2000) 21

STATUTES

Consumer Credit Protection Act,
15 U.S.C. §§ 1601-1693r 5

Consumer Credit Reporting Reform Act of 1996, Title II, Subtitle D, Ch. 1, of the Omnibus Consolidated Appropriations Act for Fiscal Year 1997 (P.L. 104-208) (Sept. 30, 1996) 8

Credit Repair Organizations Act,
15 U.S.C. §§ 1679-1679j
15 U.S.C. § 1679i(1) 13

Electronic Fund Transfers Act,
15 U.S.C. §§ 1693-1693r 7

15 U.S.C. § 1693m(g) 13

Equal Credit Opportunity Act,
15 U.S.C. §§ 1691-1691f
15 U.S.C. § 1691d 7

15 U.S.C. § 1691e(f) 13

TABLE OF AUTHORITIES – Continued

Page

Fair Credit Reporting Act,
§§ 1681-1681u
15 U.S.C. § 1681(a)(1) 6
15 U.S.C. § 1681(a)(4) 6
15 U.S.C. § 1681(b) 6
15 U.S.C. §§ 1681b-1681f 15
15 U.S.C. § 1681b(a) 12
15 U.S.C. § 1681b(f) 21
15 U.S.C. § 1681c(a)(1) 19
15 U.S.C. §§ 1681c(a)(2)-(6) 19
15 U.S.C. § 1681c(b) 19
15 U.S.C. § 1681e(a) 11
15 U.S.C. § 1681e(b) 7
15 U.S.C. § 1681g(c)(1)(B) 17
15 U.S.C. § 1681h(a)(1) 11
15 U.S.C. § 1681j(a) 17
15 U.S.C. § 1681j(b) 17
15 U.S.C. § 1681j(c)(3) 16
15 U.S.C. § 1681m(a) 15
15 U.S.C. § 1681n(a)(1) 14, 21
15 U.S.C. § 1681p 13, 14, 16
15 U.S.C. § 1681s 20
15 U.S.C. § 1681s-2(b) 21

TABLE OF AUTHORITIES – Continued

Page

Fair Debt Collection Practices Act,
15 U.S.C. §§ 1692-1692o 8
15 U.S.C. § 1692(a) 8
15 U.S.C. § 1692k(d) 14

Truth in Lending Act,
15 U.S.C. §§ 1601-1667e 7
15 U.S.C. § 1601(a) 7
15 U.S.C. § 1640(e) 13

LEGISLATIVE AND ADMINISTRATIVE MATERIAL

Federal Reserve Board Regulation B, 12 C.F.R.
§ 202.9(a) (2001) 15

Federal Reserve Board Statistical Release, G.19, Consumer Credit, March 2001, Release Date: May 7, 2001, available at http://www.federalreserve.gov/Releases/G19/Current 6

Federal Trade Commission, Identity Theft Victim Complaint Data, Figures and Trends November 1999 through March 2001, available at http://www.consumer.gov/idtheft/reports/repmar01.pdf and http://www.consumer.gov/idtheft/charts/nov99-mar01.pdf. 10

H. Rep. 103-486, 103d Cong., 2d Sess. 13, § 110, H.R. 1015, § 612(c) 17

S. Rep. 103-209, 103d Cong., 1st Sess. 2-3 (1993) 5, 6, 8, 20

INTEREST OF *AMICI CURIAE*[1]

Amici are public interest organizations with long-standing experience with the consumer reporting and privacy issues involved in this case. *Amici* are submitting this brief to provide the Court with information about the operations of the consumer reporting industry distinct from the arguments contained in the Brief for Respondent.

The National Association of Consumer Advocates (NACA) is a non-profit corporation whose members are private and public sector attorneys, legal services attorneys, law professors, and law students whose primary focus involves the protection and representation of consumers. NACA's mission is to promote justice for all consumers by maintaining a forum for information sharing among consumer advocates across the country and serving as a voice for its members as well as consumers in the ongoing struggle to curb unfair and abusive business practices. Compliance with federal consumer protection laws in general and the Fair Credit Reporting Act (FCRA) in particular has been a continuing concern of NACA since its inception.

The National Consumer Law Center, Inc. (NCLC) is a non-profit Massachusetts corporation, founded in 1969, specializing in consumer law issues, with a historical

---

[1] The parties have consented to the filing of this brief.

Counsel for a party did not author this brief in whole or in part. No person or entity, other than *Amici Curiae*, their members, or their counsel made a monetary contribution to the preparation and submission of this brief.

emphasis on consumer credit. The NCLC regularly provides legal and technical consultation and assistance on consumer law issues, including credit reporting, to legal services, government, and private attorneys representing consumers across the country. The NCLC prepares and publishes the Consumer Credit and Sales Legal Practice Series, consisting of thirteen practice treatises and annual supplements. One volume, Willard P. Ogburn, Fair Credit Reporting Act (4th ed. 1998 & Supp. 2000), is a standard resource on privacy and the FCRA that is cited by Petitioner throughout its Brief. The fairness, accuracy, and confidentiality of individuals' credit information were a persistent problem for the NCLC's low income clients even before the passage of the FCRA; these problems unfortunately continue to date.

The U.S. Public Interest Research Group serves as the national lobbying office for state Public Interest Research Groups (PIRGs). PIRGs are non-profit, non-partisan consumer, environmental and government research and advocacy organizations active in 37 states. Since 1991, U.S. PIRG and the state PIRGs have published 7 investigative reports and surveys on credit bureau errors and identity theft problems, including one joint report with the Privacy Rights Clearinghouse. The reports have been used by Congress and state legislatures in the development of legislation, including both the 1996 comprehensive credit reporting amendments and the 1998 identity theft criminalization statute enacted by Congress. California PIRG also has founded and supports the efforts of Victims of Identity Theft, a Los Angeles-based support group for victims.

The Privacy Rights Clearinghouse (PRC) is a non-profit consumer information, research, and advocacy program based in San Diego, California. It was established in 1992 when it launched a hotline to take individuals' complaints and questions on consumer privacy issues. PRC was one of the first consumer organizations to provide assistance to victims of identity theft, which became its number one topic of hotline calls beginning in 1995. PRC's victim assistance guides have helped tens of thousands of identity theft victims regain their financial health. The PRC has participated in numerous public policy proceedings (legislative and regulatory hearings, workshops, conferences) at the state and federal level on identity theft.

AARP is a non-profit organization with 34 million members aged 50 and older. It is the largest membership organization dedicated to addressing the needs and interests of older Americans. AARP participates in proceedings aimed at improving consumer protection laws and assuring adequate redress when older consumers are harmed in the marketplace. AARP supports vigorous enforcement of the Fair Credit Reporting Act. It specifically advocates for stronger laws to protect the confidentiality of Social Security numbers, to protect and provide assistance to victims of identity theft, and to ensure that consumers have avenues for redress when they are harmed by an inappropriate disclosure or use of their personal information.

The Consumer Federation of America (CFA) is a non-profit association organized in 1967 to advance the interests of consumers through advocacy and education. CFA's current membership is comprised of over 280

national, state, and local consumer groups throughout the United States, which in turn represent more than 50 million consumers. CFA supports and promotes consumer credit protections to prevent fraud and provide redress to consumers.

SUMMARY OF ARGUMENT

Congress's findings and statement of purpose when it enacted the Fair Credit Reporting Act demonstrate the significance that it rightly placed on the integrity and confidentiality of the nation's consumer reporting system. Unfortunately, the three major national consumer reporting agencies have shown an inadequate commitment over the last thirty years to conducting their business in a manner commensurate with the grave responsibilities entrusted to them.

As these consumer reporting agencies have struggled with their obligations to compile and report personal financial data completely and accurately, a relatively recent assault on the integrity of the consumer reporting system has emerged in the form of theft of identity. This phenomenon is a threat to which literally every American is vulnerable. In this area, the reporting agencies' efforts are wholly insufficient. The industry has the capability to curtail these activities, if not to bar virtually all identity thieves from compromising individual consumer reports, the *sine qua non* of the offense. Instead, the consumer reporting system itself has become the vehicle through which these thieves operate.

Through this case, the industry now seeks an interpretation of the statute of limitations that would seriously undermine the paramount method chosen by Congress to provide the necessary incentive for reporting agencies to meet their obligations to protect the integrity and confidentiality of individual consumer reports – private enforcement by aggrieved consumers. Petitioner wishes to limit the FCRA's statute of limitations in a manner that, if sustained, would create a nearly all-encompassing exception to suits by the individuals who are the victims of the current identity theft epidemic. Petitioner's supporting arguments are at odds with the plain language of the FCRA, and the "balance" which it purports to maintain is illusory.

ARGUMENT

A. Congress Has Determined That Accuracy and Respect for Privacy in Disseminating Personal Financial Information Are Essential in a Credit Economy

Congress enacted the Fair Credit Reporting Act (FCRA) in 1970 as Title VI of the Consumer Credit Protection Act, 15 U.S.C. §§ 1601-1693r (CCPA), the plenary regulation of the national consumer credit industry. Consumer credit has expanded exponentially in the last fifty years and is now one of the largest sectors of the national economy. Growing from $6 billion at the end of World War II, outstanding consumer credit debt rose to $116 billion in 1970 when Congress enacted the FCRA, reached over $700 billion by 1993 [S. Rep. 103-209, 103d Cong., 1st

Sess. 2-3 (1993)], and most recently passed $1.5 trillion. *See* Federal Reserve Board Statistical Release, G.19, Consumer Credit, March 2001, Release Date: May 7, 2001, available at http://www.federalreserve.gov/Releases/G19/Current.

To support this phenomenal level of activity, only eight years ago the consumer reporting industry maintained 450 million credit files on more than 110 million individuals and processed almost 2 billion pieces of data per month. S. Rep. 103-209, *supra*, at 3. Now, the data base of just one of the three major consumer reporting agencies contains information on the personal financial habits of 190 million persons, virtually the entire adult population of the country, and that agency alone processes approximately 1.5 billion records per month. *Trans Union Corp. v. Federal Trade Commission*, 245 F.3d 809, 812 (D.C. Cir. 2001).

Congress adopted the FCRA with the explicit recognition that the health of the consumer banking system is "dependent upon fair and accurate credit reporting" and that "[i]naccurate credit reports directly impair the efficiency of the banking system." 15 U.S.C. § 1681(a)(1); *see Bryant v. TRW Inc.*, 689 F.2d 72, 79 (6th Cir. 1982). With particular relevance to the identity theft crisis which underlies this case, Congress focused on the "need to insure that consumer reporting agencies exercise their grave responsibilities with fairness, impartiality, and a respect for the consumer's right of privacy" and "confidentiality." 15 U.S.C. §§ 1681(a)(4) and (b). Accordingly, Congress has mandated that consumer reporting agencies follow procedures to "assure maximum possible accuracy

of the information *concerning the individual about whom the report relates.*" § 1681e(b) (emphasis added).

A recurring theme at the heart of the CCPA is that prudent dissemination of credit information is essential to maintain the vitality of the credit granting system for the benefit of creditors and consumers alike. Just as Congress enacted the FCRA with the express purpose that credit grantors be in the best position to make reliable credit granting decisions, the Truth in Lending Act, 15 U.S.C. §§ 1601-1667e, Title I of the CCPA (TILA), establishes the corresponding principle through its disclosure requirements that consumers are best served through their own "informed use of credit." 15 U.S.C. § 1601(a). In addition to the FCRA and TILA, Congress has included a further self-help checking mechanism within the CCPA as Title VII, the Equal Credit Opportunity Act, 15 U.S.C. §§ 1691-1691f (ECOA), providing yet another information-sharing standard through its core requirement that creditors disclose, and consumers receive, the specific reasons for any adverse action, such as credit denial. 15 U.S.C. § 1691d.

This Court succinctly stated the guiding principle of this congressional philosophy nearly thirty years ago in its seminal teaching under the CCPA: "[B]lind economic activity is inconsistent with the efficient functioning of a free economic system such as ours." *Mourning v. Family Publication Service, Inc.*, 411 U.S. 356, 364 (1973). The FCRA was adopted with the recognition that credit decisions made in ignorance, whether by credit grantors or consumers, undermine the vitality of the consumer economy.

Unfortunately, despite the intent of Congress in adopting the FCRA, accurate information is not being consistently provided by the consumer reporting system to its credit-granting clientele. In the deliberations that culminated with the 1996 FCRA amendments [Consumer Credit Reporting Reform Act of 1996, Title II, Subtitle D, Ch. 1, of the Omnibus Consolidated Appropriations Act for Fiscal Year 1997 (P.L. 104-208) (Sept. 30, 1996)], Congress was presented with staggering statistics that nearly half of all consumer reports (48%) maintained by the three major consumer reporting agencies contains inaccurate information and nearly one out of five (19%) contains errors that could adversely affect the consumer's eligibility for credit. S. Rep. 103-209, *supra*, at 3.

The successful operation of the consumer credit system is key to the performance of the national economy and the ability of all citizens to enjoy the fruits of this country's material prosperity, the envy of the rest of the world. Failure within this system, on the other hand, is expensive as determined by the consequences of consumer default, with their resulting losses and significant personal toll ["bankruptcies, marital instability, loss of jobs, and invasions of individual privacy" (15 U.S.C. § 1692(a))], which Congress sought to prevent and deter through enactment of the Fair Debt Collection Practices Act, 15 U.S.C. §§ 1692-1692o, Title VIII of the CCPA (FDCPA). Despite the extraordinary economic and personal benefits at stake, the three major reporting agencies conduct their business with far too little regard for the inordinate personal price of their failure or for the mandates imposed by Congress to cure the agencies' shortcomings. *See Cushman v. Trans Union Corp.*, 115 F.3d 220,

224-26 (3d Cir. 1997) (criticizing inadequate reinvestigation procedures); *Federal Trade Commission v. TRW Inc.*, 784 F.Supp. 361 (N.D. Tex. 1991) (comprehensive consent order attempting to correct massive FCRA noncompliance).

B. The Three Major Consumer Reporting Agencies Have Failed to Take Available Action to Abate the Current Theft of Identity Crisis

Theft of identity is the intentional and fraudulent practice whereby an impostor poses as someone else and applies for and receives credit on the basis of another's good credit standing. The impostor then makes purchases, obtains credit cards, and takes out loans using the dishonestly obtained credit approvals and leaves the victim facially responsible for the resulting financial obligations. Worse yet, the scam saddles victims with the arduous process of ascertaining what has happened to them and of obtaining information to prove themselves innocent and to restore their good names.

The ease with which the impostor in this case stole the identity of Respondent Adelaide Andrews is all too common and illustrates the allure of the scam. Here, the impostor fraudulently used only Ms. Andrews' Social Security number, while otherwise employing her own similar but different name and completely different remaining identifying information to obtain credit. Impostors use an alternate address (sometimes simply a mail drop) to receive the purchased items, credit cards, and billing statements. The victim therefore receives no notice that a problem exists until denied credit or dunned

for payment for the impostor's debts many months or even years later.

A savvy impostor will establish an "evil profile" never touching any of the true accounts of the victim. If the victim's own accounts were to be accessed, the victim would find out earlier about the fraud. Often the impostor will obtain several credit lines to make minimum payments to keep the scam going for as long as possible so the victim does not find out there is a problem. Victims discover the identity theft on average after 15 months, and at least 20% learn of the problem only after two years. *See* Federal Trade Commission, Identity Theft Victim Complaint Data, Figures and Trends November 1999 through March 2001, available at http://www.consumer.gov/idtheft/reports/rep-mar01.pdf and http://www.consumer.gov/idtheft/charts/nov99-mar01.pdf. Even then, the victim still must determine what has transpired, often waiting weeks and months just to receive documents providing information about the accounts. This protracted process further delays taking remedial action and continues the nightmare as the victim deals with disbelieving debt collectors, annoyed creditors, and seemingly unconcerned reporting agencies.

Information received by the national reporting agencies almost always shows early evidence of obvious errors and indicia of fraud. The victims' records contain conflicting information, with one set revealing their real accounts, accurate addresses, and continued positive credit usage, and the other showing overused accounts with a lack of payments in a short time span, as well as the ever present anomalous billing addresses. Nevertheless, *Amici* have seen no evidence that the three major

reporting agencies have taken any action to use their comprehensive data bases and state of the art computing power to effectively combat this scourge. The agencies have products available to sell to creditors to detect changes of addresses (neural networks), however they do not make them available to consumers unless the consumer buys several products to monitor all three credit reporting agencies.

Unlike the recurrent errors that for years have afflicted the three major consumer reporting agencies' reports, such as merging files of different consumers based on tenuous connections, *see, e.g., Philbin v. Trans Union Corp.*, 101 F.3d 957, 960-67 (3d Cir. 1996), and *Thompson v. San Antonio Retail Merchants Association*, 682 F.2d 509, 510-13 (5th Cir. 1982) (per curiam), identity theft is purposeful sabotage. Just like those mismerge errors, however, theft of identity is a regular and predictable part of the credit reporting system; and the consumer reporting agencies whose lack of diligence facilitated the theft here are as unprepared and unsuccessful in combating this intentional misconduct as they are in maintaining the completeness and accuracy of their consumer reports. *See, e.g., Cushman*, 115 F.3d at 224-26.

Significantly, none of the three major reporting agencies discloses to consumers their own file contents based merely on a purported match of a Social Security number without additional indicia of proper identification. *See* § 1681h(a)(1). One would have expected that these agencies would follow protocols with a similar level of scrutiny to meet their parallel obligation pursuant to § 1681e(a) to provide reports only to users who have a legitimate purpose involving the subject consumer. *See*

§ 1681b(a). They do not. This "weakest link" creditor point of entry into the reporting system is all too well known to identity thieves.

C. Petitioner's Claim that the Decision Below Undermines the "Balance" Established by Congress Is a Canard

Petitioner claims that a rule allowing victimized consumers to bring enforcement actions more than two years after the reporting agency reveals personal financial information to a complete stranger "would upset the balance struck by Congress" within the overall statutory scheme. *Brief for Petitioner* at 25. Its stated basis for this assertion includes the "carefully crafted notice and access provisions in the FCRA" [*id.* at 26] and the purported increase to "the cost of doing business . . . .[by] adding to the credit industry's already massive burden of storing information." *Id.* at 30-31.

To the contrary, it is Petitioner's desire for an exclusionary reading of the FCRA, which as a practical matter would immunize consumer reporting agencies from effective private enforcement, that conflicts with Congress's handiwork. Indeed, these factors that Petitioner cites actually support the decision below and undermine its own self-serving view of how the FCRA should function.

It would be an injustice for victims to lose their right to enforce the provisions of the FCRA when in fact they have no idea they have even been harmed. Many victims have good credit and do not apply for a loan or credit card for several years. If the impostor has established several credit lines, is making minimum payments, and

has not charged accounts to their limits, the charade can continue without the victim's knowledge for years. When consumers finally learn of the fraud, they often experience further victimization from creditors who will not provide billing statements, from credit reporting agencies which delay sending the credit profiles, and from police who will not even take a report. To expect victims also to address the legal issues when they do not yet understand what has happened to them is unreasonable.

1. The Plain Language Chosen by Congress Belies Petitioner's Argument

First, the plain language of § 1681p is the most reliable indicator of Congress's intent to reject Petitioner's interpretation of this subsection. Petitioner's contention is that the statute of limitations commences when it allegedly *violates* a statutory duty. *Brief for Petitioner* at 16 ("it is at that point that the agency violates the Act"). Congress expressly rejected that standard, however, when it adopted § 1681p's calculation of the start of the limitations period as "the date on which the liability arises," as discussed in the Brief of Respondent. In doing so, Congress chose language different from the terminology that it employed in each of the five other Titles of the CCPA with private rights of action. The statutes of limitations in each of the other CCPA Titles specifically run from the time of the defendant's "violation" of the law, the same language as in the version of the FCRA that was discarded before final enactment. *See* § 1640(e) (TILA) ("from the occurrence of the violation"), § 1679i(1) (Credit Repair Organizations Act) (same), § 1691e(f) (ECOA) (same), § 1693m(g) (Electronic Fund Transfers Act)

(same), and § 1692k(d) (FDCPA) ("from the date on which the violation occurs").

No federal appeals court which has adopted Petitioner's position has considered this deliberate congressional choice of language. Instead, each has reached its conclusion without critical analysis of the CCPA's coordinated statutory scheme. *See Houghton v. Insurance Crime Prevention Institute*, 795 F.2d 322, 325 (3d Cir. 1986), and its progeny. These courts based their rulings on the erroneous belief that the result is mandated to avoid rendering the final portion of § 1681p "superfluous." *Id.* This primary basis for affirmance of the decision below is the focus of Respondent's argument and will not be repeated by *Amici*.[2]

2. Petitioner Relies on Notice Provisions Which Do Not Protect Victims of Theft of Identity

Petitioner erroneously contends that the FCRA's notice provisions make it "unnecessary and inappropriate" to affirm the decision below. The FCRA's notice requirements do not allow victims of identity theft to learn when their identities have been stolen or when a

---

[2] The events here arose prior to the effective date of the 1996 amendments, which accordingly are inapplicable. This case therefore does not provide an opportunity for determining whether "the date on which liability arises" may be different under the current law in view of Congress's addition in § 1681n(a)(1) of statutory minimum damages without regard to actual damages sustained. *Amici* are not suggesting that a different result is warranted (and do not believe that it is) but wish only to alert the Court to a conceivably material change in the law.

consumer reporting agency unlawfully has disclosed the personal financial information contained in their files. The only provision of the FCRA that could alert typical consumers to potential problems with their files is § 1681m(a), which requires transmittal of adverse action notices that necessarily are sent to the impostor. By the nature of the theft of identity scam, the victimized consumer never will receive such a notice because the single essential component of the successful scam is that the impostor establishes a billing address different from the victim's – a discrepancy in itself sufficient to alert a consumer reporting agency to a possible impermissible purpose or theft of identity.

Each of the FCRA's notice provisions naturally presumes that the user and the agency correctly have identified the subject consumer in order to properly deliver notice. Petitioner itself conceded as much in its *Petition for a Writ of Certiorari*, at 13, when it recognized the limitations of consumer notification under non-fraudulent circumstances:

> Because most of the conduct regulated by the Act involves the conduct of credit reporting agencies and their customers independent of consumers, *see* 15 U.S.C. §§ 1681b-1681f, consumers are not normally immediately aware of violations of the Act.

Through the interaction of the ECOA and the FCRA, in the normal course of consumer credit applications and denials, individuals will be given notice within 30 days of potential problems in their files. *See* Federal Reserve Board Regulation B to the ECOA, 12 C.F.R. § 202.9(a) (2001). There is no occasion for a proper delivery of

notice where, as here, the problem arises from identity theft because the agencies unquestioningly accepted that a consumer suddenly has changed her address or is living in separate areas of the country simultaneously and ignored a radically altered pattern of credit transactions. In these situations, victims typically learn of the scam only when they eventually are dunned for payment or are denied credit based on the impostor's activities, just as occurred in this case.

Inherent in Petitioner's argument is its recognition that unless adversely affected consumers can readily discover when a reporting agency has violated their rights, then the statute of limitations impermissibly becomes an all-encompassing exception that eliminates the remedy. In the real world of identity theft victims, the inevitable result of Petitioner's argument is nearly that. Accordingly, Petitioner is not seeking a reasonable interpretation of § 1681p but effective immunity from the remedies established by Congress for its own misconduct.

3. Consumer Reporting Agencies Convinced Congress to Eliminate the Very Access Provision Which Would Have Supported the Position Now Advanced Before This Court

Contrary to Petitioner's current assertions, the FCRA contains no general access provision that would alert consumers to the presence of an identity thief who might be compromising their files. If consumers have reason to believe that they are victims of identity theft, they are entitled to see the contents of their files. § 1681j(c)(3). Otherwise, consumers receive the information only after

having been notified of adverse action [§ 1681j(b)] or by paying the reporting agency for the disclosure. § 1681j(a). Therefore, access to the contents of one's report is limited to those who are not victims of identity theft and who properly receive an adverse action notice, to those who already have learned that they have been victimized, and to those who affirmatively request and pay for the report.

In the process leading to its adoption of the 1996 amendments, Congress included a provision that would have permitted all consumers to request and receive disclosure of the contents of their files free once each year. H. Rep. 103-486, 103d Cong., 2d Sess. 13, § 110, H.R. 1015, § 612(c). Petitioner and its industry, however, convinced Congress to delete that provision from the final bill. Had industry joined with consumer groups in urging passage of this general access provision, Petitioner's representation to the Court that the FCRA "enable[s] consumers to discover violations of the Act in a timely fashion" [*Brief for Petitioner* at 27] would have been meaningfully correct. Instead, industry insisted on treating consumers' access to their own personal financial information as a profit center, so that the timely discovery of an unwarranted disclosure at the behest of an impostor still is limited to those consumers for whom there are no violations to discover, those who already have reason to know that they have been victimized, or those who are clairvoyant.

This unwillingness by the three major reporting agencies to communicate with consumers continued long after adoption of the 1996 amendments. Most recently, each of the agencies confessed its noncompliance with § 1681g(c)(1)(B)'s requirement to maintain a national toll-

free telephone number accessible to consumers during normal business hours and agreed to the entry of remedial consent decrees with substantial civil monetary penalties and injunctive relief. *United States v. Experian Information Solutions, Inc.*, No. 3-00CV0056-L (N.D. Tex. 2000), available at http://www.ftc.gov/os/2000/01/experianconsent.htm; *United States v. Equifax Credit Information Services, Inc.*, No. 1:00-CV-0087 (N.D. Ga. 2000), available at http://www.ftc.gov/os/2000/01/equifaxconsent.htm; and *United States v. Trans Union LLC*, No. 00C 0235 (N.D. Ill. 2000), available at http://www.ftc.gov/os/2000/01/transunionconsent.htm. Therefore, the notion advanced by Petitioner that the consumer reporting industry is responsive to consumers is disingenuous at best.

4. Petitioner's Claimed Record-Keeping Burden Is Unfounded

Petitioner and its industry are subject to no significant record maintenance burden as a result of the FCRA's statute of limitations, and no resolution of this case will have any substantial impact on its current practices in this regard. Mammoth compilation and maintenance of personal data *is* the business (not the burden) of this industry. If there were no private FCRA remedy at all, this industry would continue to maintain its records in the same manner that it currently does. Industry's record keeping is driven by its business model, not the duration of the limitations period.[3]

---

[3] Further undermining Petitioner's argument, the substantive statutory limit for reporting adverse information is

Petitioner's records are electronically and digitally stored. The image evoked by Petitioner's argument of warehouses of documents or banks of microfilm is from another century. *Amici* are aware of no practice in this industry of routinely or systematically deleting records after passage of a two year statute of limitations or at any time. Even current technology is capable of maintaining permanent data storage. In any event, memory and capacity are constantly evolving and the cost is decreasing at such rates that Petitioner's assertion not only is unsupported but is a chimera.

Petitioner has provided no factual basis for its argument. To the contrary, *Amici* are informed that evidence in the sealed record in this case actually refutes it. *See* Declaration of Dr. Douglass Stott Parker, Jr., discussing Petitioner's data retention policies. ER6: 287-88.

5. The Only Statutory Balance at Risk Is the Private Enforcement Remedy That Petitioner Now Seeks to Eliminate

It is unfortunately all too evident to *Amici* that the consumer credit reporting industry has insufficient incentives to effectively combat theft of identity. Its monetary customer base is not the victimized consumers whose lives are so devastatingly disrupted, sometimes for years, by their struggle to reverse the damage done to their

---

seven years [§§ 1681c(a)(2)-(6)], with certain bankruptcy information lasting ten years [§ 1681c(a)(1)] and no limitation on relatively larger but still modest consumer transactions, such as purchasing a home. § 1681c(b).

finances and credit reputation. Instead, as Petitioner recognizes, its customers are credit grantors, who absorb the losses from theft of identity as a relatively small cost of doing business and who likewise have inadequate incentives to pressure reporting agencies to voluntarily engage in the simple computer-matching vigilance and occasional human file review that are needed to stem identity theft. Only the individual consumer whose financial integrity has been compromised has sufficient incentive to take action.

Congress clearly recognized the crucial role that consumers have in enforcing the CCPA when it adopted six Titles with private attorney general enforcement provisions. No one has a stake in the integrity of a credit report like the consumer to whom it relates. While the FTC deals as best it can with systemic issues [§ 1681s], Congress has not funded the army of regulators that would be necessary to review the nearly 600 million files that the three major reporting agencies maintain. Congress gave that role to each of the individuals whose tranquillity and material well-being are determined by these faceless, computer-generated reports.

Congress and the FTC both have reaffirmed the Commission's own limitations and this critical role played by consumers. During the 1996 amendment process, the FTC acknowledged that the FCRA "was designed to be largely self-enforcing" and expressed its position directly to Congress that any amendments maintain "the capacity of consumers to bring private actions to enforce their rights under the statute." S. Rep. 103-209, *supra*, at 6. Congress's response was to strengthen private enforcement by encouraging consumer litigation through the adoption of

a specific civil prohibition against unlawful access or use of consumer reports [§ 1681b(f)] and minimum statutory damages [§ 1681n(a)(1)] and creating for the first time a private right of action allowing a consumer to sue furnishers of information for failing to meet their duties in the reinvestigation process. § 1681s-2(b); *DiMezza v. First USA Bank, Inc.*, 103 F.Supp. 2d 1296, 1300 (D.N.M. 2000); *McMillan v. Experian Information Services, Inc.*, 119 F.Supp.2d 84, 88 (D.Conn. 2000); *Whitesides v. Equifax Credit Information Services, Inc.*, 125 F.Supp.2d 807, 812-13 (W.D.La. 2000).

It is this statutory balance that is at risk in this case. If Petitioner's position is sustained, the consumer reporting industry will be permitted to conduct its business, as it has been, with virtually no concern about possible private enforcement of its statutory duties relating to identity theft, so long as it can keep the victimized consumer in the dark for up to two years.

CONCLUSION

For the foregoing reasons, the decision of the Ninth Circuit should be affirmed.

Respectfully submitted,

RICHARD J. RUBIN
(Counsel of Record)
1300 Canyon Road
Santa Fe, New Mexico 87501
(505) 983-4418

JOANNE S. FAULKNER
123 Avon Street
New Haven, Connecticut 06511
(202) 772-0395

WILLARD P. OGBURN
NATIONAL CONSUMER LAW CENTER
18 Tremont Street, Suite 400
Boston, Massachusetts 02108
(617) 523-8010

DEBORAH M. ZUCKERMAN
STACY J. CANAN
AARP FOUNDATION
MICHAEL R. SCHUSTER
AARP
601 E Street, N.W.
Washington, DC 20049
(202) 434-6045

Counsel for Amici Curiae